

Cause No. PD-0799-19

In the Court of Criminal Appeals
of Texas

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12/5/2022
DEANA WILLIAMSON, CLERK

The State of Texas,
Appellant
v.

Sheila Jo Hardin,
Appellee

On State's Motion for Rehearing after Opinion
On State's Petition for Discretionary Review

**BRIEF OF THE DISTRICT ATTORNEYS OF DALLAS, KAUFMAN,
AND LAMAR COUNTIES
AS AMICI CURIAE SUPPORTING
THE STATE'S MOTION FOR REHEARING**

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TABLE OF CONTENTS

Table of Contents.....	2
Index of Authorities.....	3
Summary of the Argument.....	7
Argument.....	8
1. This Court’s opinion broke the traffic code.....	8
1.1. Applied to the rest of the transportation code, the Court’s opinion yields absurd and disastrous results.....	8
1.2. The opinion’s reasoning is not limited to failure to maintain a single lane.	9
1.3. The opinion unnecessarily calls the constitutionality of a frequently used statutory phrase into question.	12
1.4. The opinion appears to dispute that the “general offense” defined in the traffic code is the penal provision that makes traffic violations crimes.	13
2. The legislature cannot fix it.....	14
3. The difficulty in writing a better traffic code is that it is already written in plain language, and this Court’s opinion failed to apply that text.....	15
Conclusion & Prayer	19
Certificate of Compliance.....	21
Certificate of Service	21

INDEX OF AUTHORITIES

CASES

<i>Dobbs v. State</i> , 434 S.W.3d 166 (Tex. Crim. App. 2014).....	15
<i>Goodrum v. Henton</i> , 93 Ga. App. 592 (1956).....	12
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	13
<i>State v. Colyandro</i> , 233 S.W.3d 870 (Tex. Crim. App. 2007).....	14
<i>State v. Hardin</i> , PD-0799-19, 2022 WL 16635303 (Tex. Crim. App. Nov. 2, 2022).....	passim
<i>State v. McBroom</i> , 179 Or. App. 120 (2002)	17

STATUTES

75 Pa. Cons. Stat § 3309	13
Act of April 15, 1971, 62nd Leg., R.S., ch. 83, 1971 Tex. Gen. Laws 722	10
Act of April 21, 1995, 74th Leg., R.S., ch. 165, 1995 Tex. Gen. Laws 1025	10
Act of June 3, 1947, 50th Leg., R.S., ch. 421, 1947 Tex. Gen. Laws 967	10
Ala. Code § 32-5A-88.....	12
Alaska Admin. Code tit. 13, § 02.085.....	12
Ariz. Rev. Stat. § 28-729	12
Ark. Code 27-51-302.....	12
Cal. Vehicle Code § 21658.....	12
Colo. Rev. Stat. § 42-4-1007	12
Conn. Gen. Stat. § 14-236	12
Coquille Ind. Tr. Code 675A.370	13

Del. Code tit. 21, § 4122	12
Fla. Stat. § 316.089.....	12
Ga. Code § 40-6-48	12
Haw. Rev. Stat. § 291C-49.....	12
Idaho Code § 46-637.....	12
Ill. Comp. Stat. 5/11-709.....	12
Ind. Code § 9-21-8-11.5.....	12
Iowa Code § 321.306.....	12
Kan. Stat. 8-1522	12
Ky. Rev. Stat. § 189.340.....	12
La. Stat. § 32:79.....	12
Md. Code Transp. § 21-309.....	13
Me. Rev. Stat. tit. 29-a, § 2051	12
Mich. Comp. Laws § 257.642.....	13
Minn. Stat. 169.18.....	13
Miss. Code § 63-3-603	13
Mo. Rev. Stat. § 304.015	13
Mont. Code § 61-8-328.....	13
N.C. Gen. Stat. § 20-146.....	13
N.D. Cent. Code § 39-10-17	13
N.H Rev. Stat 265:24	13
N.J. Stat. 39:4-88.....	13
N.M. Stat. § 66-7-317.....	13
N.Y. Veh. & Traf. § 1128	13
Navajo Nation Code tit. 14, § 305.....	13
Neb. Rev. Stat § 60-6,139	13
Nev. Rev. Stat. § 484B.223.....	13
Ohio Rev. Code § 45.11-33.....	13
Okla. Stat. tit. 47, § 11-309	13
Or. Rev. Stat. § 811.370.....	13

R.I. Gen. Laws § 31-15-11.....	13
S.C. Code § 56-5-1900	13
S.D. Codified Laws § 32-26-6	13
Tenn. Code § 55-8-123	13
Tex. Transp. Code § 542.301	13
Tex. Transp. Code § 545.060	10
Tex. Transp. Code § 545.153	8, 11
Tex. Transp. Code § 545.253	9
Tex. Transp. Code § 547.372	12
Tex. Transp. Code § 545.101	12
Utah Code § 41-6a-710	13
Va. Code § 46.2-804.....	13
Vt. Stat. tit. 23, § 1038.....	13
W. Va. Code § 17C-7-9.....	13
Waganakising Odawa Tribal Code § 9.341.....	13
Wash. Rev. Code § 46.61.140.....	13
Wis. Stat. § 346-13.....	13
Wyo. Stat. § 35-5-209.....	13

OTHER AUTHORITIES

Antonin Scalia & Brian Garner, <i>Reading Law</i> (2012)	17, 18
Blades of Glory (Paramount Pictures 2007)	13

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This brief is tendered on behalf of the district attorneys of Dallas, Kaufman, and Lamar counties as amici curiae in support of the State's motion for rehearing. This brief was prepared by a salaried assistant district attorney and no additional fees have been paid for preparing the brief. A copy of this brief has been served on all parties under Rule 11, and on the State Prosecuting Attorney under Rule 80.1.

SUMMARY OF THE ARGUMENT

Do the “rules of the road” regulate drivers? Or—as the Court’s opinion suggests—are they lists of elements that must be satisfied before an officer can be said to have reasonable suspicion for a traffic stop? The answer is provided by the text: “*An operator . . . shall . . .*”. Because the Court’s opinion departed from the text, it reached a different result and broke the traffic code.

The opinion attempts to limit its rationale to the laned-traffic statute, but its reach goes further. Much of the traffic code is structured the same as the laned-traffic statute, and none of the features of that statute on which the Court’s analysis depends are unique. Moreover, the opinion unnecessarily calls the commonly-used phrase *as nearly as practical* into constitutional doubt without regard for other statutes that use it. Even worse, the opinion appears to dispute that the general traffic offense defines an offense at all. If that’s the case, much of the traffic code is unenforceable.

For all of these problems, there is not much the legislature can do to solve them. The traffic code is already written plainly. Its language is lucid. Its structure is sound. There is a general offense that makes it a crime to violate one of the rules of the road, and the rules unambiguously impose obligations on drivers. Only by departing from the text does the opinion hold the opposite. The Court should grant rehearing to construe the transportation code according to its text.

ARGUMENT

1. This Court's opinion broke the traffic code.

This Court's opinion holds that indiscriminate and purposeless swerving is not, in itself, a traffic offense. Perhaps that is something we can all live with as a matter of policy, but the problem is the reasoning the opinion employs to reach that result. The Court's opinion broke the traffic code.

1.1. Applied to the rest of the transportation code, the Court's opinion yields absurd and disastrous results.

A glance at the traffic code reveals the expansive reach of the opinion. Most of the traffic code is structured similar to the statute regulating laned traffic. Here are just two examples not yet discussed by the opinions in the case:

Vehicle Entering Stop or Yield Intersection

An operator approaching an intersection on a roadway controlled by a yield sign shall:

- (1) slow to a speed that is reasonable under the existing conditions; and
- (2) yield the right-of-way to a vehicle in the intersection or approaching on another highway so closely as to be an immediate hazard to the operator's movement in or across the intersection.

Tex. Transp. Code § 545.153(c).

Buses to Stop at All Railroad Grade Crossings

Except as provided by Subsection (c), the operator of a motor bus carrying passengers for hire, before crossing a railroad grade crossing:

(1) shall stop the vehicle not closer than 15 feet or farther than 50 feet from the nearest rail of the railroad;

(2) while stopped, shall listen and look in both directions along the track for an approaching train or other on-track equipment and signals indicating the approach of a train or other on-track equipment; and

(3) may not proceed until it is safe to do so.

Tex. Transp. Code § 545.253(a).

Surely a driver must both slow down and yield at a yield sign. Surely a bus driver must stop an appropriate distance from the tracks, listen and look, and not proceed until it is safe. That is what the text of each of these provisions says. And yet, if these similarly structured statutes are construed under the Court's approach in this case, a driver has complied if he performs a single required act or refrains from a single prohibition listed in the applicable statute. A driver approaching a yield sign can either slow down or yield. The driver of a bus full of children can either stop, look, and listen at a railroad track, or just cross the tracks without looking if it turns out to be safe to cross.

1.2. The opinion's reasoning is not limited to failure to maintain a single lane.

The opinion distinguishes failure to maintain a single lane on three facts that are not unique to that rule. While the opinion seems to treat these features of the statute as guardrails that limit future application of the Court's analysis, they are not limitations at all.

First, the Court chose to read the requirements of the laned-traffic statute together based on the “interconnectedness of each subsection.” *State v. Hardin*, PD-0799-19, 2022 WL 16635303, at *5 (Tex. Crim. App. Nov. 2, 2022). The opinion cited the use of the conjunctive *and* between the two requirements, combined with the first requirement’s use an indefinite article and the second requirement’s use a definite article. *Id.* Second, the Court noted that the entire subsection “was originally drafted as a single sentence.” *Id.* at *7. But so were most of the rules of the road.

This quirk of legislative history is not unique to failure to maintain a single lane, so this Court cannot hang its hat on it when addressing other transportation code provisions. As the opinion acknowledges, the “set of comprehensive statutes regulating traffic” were recodified together into the transportation code in 1995. *Id.* Any traffic rule that existed at the time was drafted similarly, including the yield-sign and bus-at-a-railroad statutes discussed above.¹

Of course, the laned-traffic statute, like all of the above statutes and most of the transportation code, is still drafted as a single sentence. Tex. Transp. Code § 545.060(a). It follows that a noun introduced with an indefinite *a* is later referred to with a definite *the* later in the sentence. Each requirement refers to the same lane. The sentence still comprises two requirements joined with the word *and*, thus imposing

¹ Compare Act of June 3, 1947, 50th Leg., R.S., ch. 421, § 88, 1947 Tex. Gen. Laws 967, 983 (buses at railroad crossings) and Act of April 15, 1971, 62nd Leg., R.S., ch. 83, § 73, 1971 Tex. Gen. Laws 722, 736 (yield signs) with Act of April 21, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1629, 1632. (breaking language into multiple subsections).

two obligations upon the driver—a fact the opinion seems to acknowledge before holding the opposite. *Compare Hardin*, 2022 WL 16635303, at *5 (“the legislature’s use of the word “and” in the statute suggests that a driver must both drive in a single marked lane as nearly as practical and not move from that lane unless it can be done safely.”) *with* 2022 WL 16635303, at *6 (“we hold that a person only violates Transportation Code § 545.060(a) if the person fails to maintain a single marked lane of traffic in an unsafe manner.”).

The opinion draws a third distinction in attempting to distinguish the school-bus-stop-sign statute raised by Judge Yearly, but it only begs the question. According to the Court, the school-bus-stop-sign statute (yet another statute with similar structure to the laned-traffic statute) could never be construed similarly because its requirements deal with “two separate acts.” *Id.* at *7. The sections of the transportation code are intuitively grouped by related conduct pertaining to a given situation. For example, the yield-sign statute above requires a driver approaching a yield sign to slow and yield. Tex. Transp. Code § 545.153(c). How are drivers to know when this Court will construe multiple requirements pertaining to the same conduct as two separate acts?

1.3. The opinion unnecessarily calls the constitutionality of a frequently used statutory phrase into question.

In justifying its construction as a saving one, the Court’s opinion nonchalantly asserts that the use of the phrase “as nearly as practical” in the single-lane rule is unconstitutional unless further “modified.” 2022 WL 16635303, at *5. Presumably the same reasoning would apply to other similarly worded rules, such as the lighting requirement for combination vehicles. Under that provision, a unit of farm equipment towed behind a tractor must be equipped with two red reflectors that are “mounted to indicate, *as nearly as practicable*, the extreme width of the vehicle or combination of vehicles.” Tex. Transp. Code § 547.372(a)(2). Yet the phrase “as nearly as practicable” cannot be modified by anything else in that sentence. Similarly, to make a right turn at an intersection, the “operator shall make both the approach and the turn *as closely as practicable* to the right-hand curb or edge of the roadway.” Tex. Transp. Code § 545.101(a). Similar language governs left turns. *Id.* at (c) (“as closely as practicable”), (d) (“to the extent practicable”). Are all these statutes unconstitutional? Surely not.

The phrase *as nearly as practicable* or *as nearly as practical* appears in single-lane statutes nationwide.² No other jurisdiction has declared the phrase constitutionally

² The District of Columbia, at least three tribal nations, and every state except Massachusetts requires vehicles to operate “as nearly as practical” or “as nearly as practicable” within a single lane. Ala. Code § 32-5A-88; Alaska Admin. Code tit. 13, § 02.085; Ariz. Rev. Stat. § 28-729; Ark. Code 27-51-302; Cal. Vehicle Code § 21658; Colo. Rev. Stat. § 42-4-1007; Conn. Gen. Stat. § 14-236; Del. Code tit. 21, § 4122; Fla. Stat. § 316.089; Ga. Code § 40-6-48; Haw. Rev. Stat. § 291C-49; Idaho Code § 46-637; Ill. Comp. Stat. 5/11-709; Ind. Code § 9-21-8-11.5; Iowa Code § 321.306; Kan. Stat. 8-1522; Ky. Rev. Stat. § 189.340(7)(a); La. Stat. § 32:79; Me. Rev. Stat. tit. 29-a, § 2051; Md. Code

suspect.³ This is not a case where “no one knows what it means, but it’s provocative.” *Cf.* *Blades of Glory* (Paramount Pictures 2007). To the contrary, everyone knows what it means without overthought.

1.4. The opinion appears to dispute that the “general offense” defined in the traffic code is the penal provision that makes traffic violations crimes.

Most dramatically, the opinion seems to suggest that the “general offense” provision does not define an offense—that it merely regurgitates the general principle that criminal offenses can (or must) be based on an act or omission. 2022 WL 16635303, at *6–7. But if the general offense—which starts with “a person commits an offense if . . .”—doesn’t define an offense, then there is no authority for prosecuting most of the rules of the road. Only traffic rules with their own penal provisions embedded can be traffic offenses.⁴

Transp. § 21-309; Mich. Comp. Laws § 257.642; Minn. Stat. 169.18; Miss. Code § 63-3-603(1)(a); Mo. Rev. Stat. § 304.015; Mont. Code § 61-8-328; Neb. Rev. Stat § 60-6,139; Nev. Rev. Stat. § 484B.223; N.H. Rev. Stat 265:24; N.J. Stat. 39:4-88; N.M. Stat. § 66-7-317; N.Y. Veh. & Traf. § 1128; N.C. Gen. Stat. § 20-146; N.D. Cent. Code § 39-10-17; Ohio Rev. Code § 45.11-33; Okla. Stat. tit. 47, § 11-309; Or. Rev. Stat. § 811.370; 75 Pa. Cons. Stat § 3309; R.I. Gen. Laws § 31-15-11; S.C. Code § 56-5-1900; S.D. Codified Laws § 32-26-6; Tenn. Code § 55-8-123; Utah Code § 41-6a-710; Vt. Stat. tit. 23, § 1038; Va. Code § 46.2-804(2); Wash. Rev. Code § 46.61.140; W. Va. Code § 17C-7-9; Wis. Stat. § 346-13; Wyo. Stat. § 35-5-209; D.C. Mun. Regs. tit. 18, § 2201.6; Navajo Nation Code tit. 14, § 305; Coquille Ind. Tr. Code 675A.370; Waganakising Odawa Tribal Code § 9.341(B)(9)(a).

³ Faced with a void-for-vagueness challenge, the Georgia Court of Appeals did not find it necessary to combine the statute’s requirements. *Goodrum v. Henton*, 93 Ga. App. 592, 594 (1956).

⁴ There are about 25 of these provisions, which generally carry greater punishment than the general offense that penalizes most traffic violations. *See* Tex. Transp. Code § 542.301(b) (“Except as otherwise provided, an offense under this subtitle is a misdemeanor”).

Admittedly, the opinion simultaneously recognizes that “a violation of the traffic code amounts to a criminal offense,” but it’s unclear how that can be if the general offense is not considered the operative penal provision. While it is constitutional to use the word *practical* in a penal statute, it is unconstitutional to prosecute for an offense that is not expressly defined in statute. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (noting the origin of void-for-vagueness doctrine in the principles of notice to the public and establishing minimal guidelines for law enforcement). If this Court grants rehearing for no other reason, it should be to clarify that the general-offense statute still defines an offense, and that all other previously recognized traffic offenses are still offenses under the general-offense statute, even if failure to maintain a single lane is not.

To avoid these absurd results, the legislature would have to re-structure the entire traffic code, a task made all the more difficult by the fact that the code’s current structure is perfectly pellucid.

2. The legislature cannot fix it.

Suppose the 88th Legislature disagrees with the Court’s opinion in this case—wholly as a policy matter—and wishes to write a new statute to ensure failure to maintain a single lane is an offense in itself. In other words, the legislators don’t want people weaving down the highway just because it may appear to be safe to do so. How would they write that statute?

With the doubt the opinion casts on the general offense, the legislature probably needs to write a new traffic offense. But what more can the legislature say besides “a person commits an offense if . . .”? The requirement of driving within a single lane needs to be imposed on the vehicle operator, but what more can the legislature say besides “An operator . . . shall . . .”? Each of the rules of the road needs to apply to the driver conjunctively, such that the driver is required to follow all the rules pertaining to a topic or situation, rather than only one of them. What more can the legislature do besides join the rules with the word *and*?

The usual remedy for a suboptimal construction of a statute is for the legislature to amend it. This Court has even said that legislative silence after an opinion from this Court is an endorsement of the Court’s construction. *State v. Colyandro*, 233 S.W.3d 870, 877 (Tex. Crim. App. 2007). Yet the legislature cannot fix this construction because the statute’s unambiguous language has been construed to mean the opposite of what it says.

3. The difficulty in writing a better traffic code is that it is already written in plain language, and this Court’s opinion failed to apply that text.

Its language lucid and its structure sound, the transportation code is written plainly. The general offense makes it a misdemeanor to violate the rules of the road, and then the rules are written as lists of obligations imposed on drivers. Any driver can look at the rules and know what is required of them. The problem is that this

Court has now construed the rules not as obligations of drivers, but as elements the State must prove to justify a traffic stop. In doing so, the Court has abandoned the text.

This Court is bound by a basic tenet of textualism: that the legislature has used every word in a statute for a purpose, and that each word, phrase, or clause, and sentence should be given effect if reasonably possible. *See Dobbs v. State*, 434 S.W.3d 166, 172 (Tex. Crim. App. 2014). Indeed, that is the only way to respect the legislature’s prerogative to make the law. Yet the opinion renders subsection (a)(1) and its practicality standard meaningless. In reasoning that any purposeless-but-safe weaving is necessarily “practical” under (a)(1), and holding that the only question is whether the movement is “unsafe” under (a)(2), the opinion effectively redacts subsection (a)(1) from the statute. *See* 2022 WL 16635303 at *5.

Although the opinion purports to address only the offense of failure to maintain a single lane, its rejection of the general offense as the operative penal provision has effectively changed the words of every rule of the road. By suggesting that the statute that says “a person commits an offense if . . .” does not define an offense (and yet maintaining that traffic offenses exist) the opinion reads “a person commits an offense if . . .” into every traffic rule in place of the text the legislature wrote in those statutes: “An operator . . .”. Only in this way could the opinion reach its result that the conjunctive *and* binds the State, rather than the driver.

The Court further departed from the text by using a definition of *nearly* that required it to delete even more words from the statute. Setting aside Judge Keller’s keen observation that the opinion uses a recent definition of *nearly* from a modern dictionary instead of a contemporaneous definition, the definition in the opinion simply does not fit into the semantics of the statute. *See* Antonin Scalia & Brian Garner, *Reading Law* 418 (2012) (urging courts to notice when the dictionary definitions of a term do not account for semantic differences that vary context-to-context). Plugged directly into the statute, the opinion’s chosen definition would cause it to read “shall drive as [almost but not quite] as practical entirely within a single lane.” The definition does not fit, so the opinion changes the words, redacting from the statute both the word *practical* and the word *as* on either side of *nearly*. This allows the rest of the opinion to work with the phrase *shall drive almost but not quite within a single lane*. 2022 WL 16635303, at *4 (“He or she must ‘almost but not quite’ stay within the lane.”). Unlike the phrase the legislature actually used, this phrase lends itself to the interpretation that it is “designed to protect motorists” from prosecution for minimal, incidental, inadvertent departures from the lane due to a driver’s lack of ability, rather than covering departures from the lane (of any degree) that are practical under the circumstances. *See id.*

Because the opinion chooses a definition that does not account for the semantics of the statute, the opinion must change the statute’s words, which changes the meaning and further bolsters the positions that (1) *as nearly as practical* is

constitutionally dubious; and (2) subsection (a)(1)'s practicality standard should be considered redundant of subsection (a)(2)'s safety standard. All of this ignores the meaning of the phrase as a whole. As Judge Keller notes, there are more appropriate definitions of the term *nearly* that do not require judicially amputating the *as* on either side from the statute. 2022 WL 16635303, at *8 (Keller, J., dissenting). Even when this Court fractured into four pieces in *Leming*, there was no dispute over what *as nearly as practical* meant. By changing the statute's words six years later, this Court changed the starting point for the analysis, and in turn arrived at an incorrect meaning.

Finally, the opinion's reliance on a general concept of "interconnectedness" also abandons the text in context in favor of an amorphous notion of legislative intent. *See* Scalia & Garner, *supra*, at 391. Normally, reading the subsections of a statute together still involves applying any plain meaning. *See State v. McBroom*, 179 Or. App. 120, 125 (2002) (construing a similar laned-traffic statute). Here, the Court used the concept of "interconnectedness" to divine a legislative intent independent of the text itself.

None of these atextual theories of construction on which the opinion relies were argued by Appellee. Not in the trial court. Not in the court of appeals. Not in this Court. This case was submitted without argument. The State had no opportunity to address the Court's reasoning until the opinion used it to make law.

By failing to apply the text of the statute, the Court has invaded the province of the legislature, and done so in a way that the legislature cannot remedy. By relying on

atextual theories not argued to the Court, the opinion deprived the State of its right as a party to be heard. For these reasons, the Court should grant rehearing.

CONCLUSION & PRAYER

While this Court has grappled with failure to maintain a single lane for years, its work has just begun if it allows this opinion to stand. There are countless other similarly situated statutes in the transportation code that, per this Court's opinion, must be addressed one-by-one to determine if the normal rules of grammar apply and the statutes mean what they say, or if their subsections need to be read to modify each other such that the meaning is the opposite. *See* 2022 WL 16635303, at *7 (rejecting the general offense and noting that determining how many offenses lurk within each rule of the road "requires examination of the specific statutes that actually require or proscribe conduct."). In the meantime, without any unifying principle for how these provisions should be construed, some trial courts will grant motions to suppress that others would deny as a matter of law, and appellate courts will continue to split, leading to disparate treatment of defendants across the state until each traffic provision can be construed by this Court. The construction of the rules-of-the-road subtitle affects every kind of case, from traffic tickets to capital murders where evidence is recovered during a traffic stop. The rules of the road are too important to vary county-by-county or court-by-court. Everyone is entitled to equal protection under the law.

Texas drivers deserve better. The average driver can't be expected to read this Court's hand down each week to know what is required of them. If we expect drivers to follow the rules and police officers to enforce them in the field, everyone needs to know what they are. Every rule needs to mean what it says.

All of this can be avoided if the Court reconsiders its opinion in this case. The Dallas County District Attorney asks this Honorable Court to (1) grant the State's motion for rehearing, and (2) issue an opinion implementing the plain text of the failure-to-maintain-a-single-lane statute.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this document contains 4,152 words, according to Microsoft Word 2016, exclusive of the sections excepted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief was served on all parties under Rule 11, and the State Prosecuting Attorney under Rule 80.1. Service was made on December 2, 2022, by EFile's e-service feature to the following email addresses:

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